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Supreme Court of the United States

APRIL TERM, 1965

No. 916

LUCIAN J. ROSSI,

Claimant-Petitioner,

against

PETER L. MALKIN, HARRY B. HELMSLEY, IRVING SCHNEIDER, J. HERBERT LEDER, SEYMOUR A. SMITH, FRANK ROBINSON, ALVIN S. LANE, HENRY W. KLEIN, ALVIN SILVERMAN, LEO WEINSTEIN, WILLIAM F. PURCELL, BERNARD T. HEIN, co-partners, doing business as FISK BUILDING ASSOCIATES,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TO THE HON. CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petitioner herein applies for a writ of certiorari to review the final order of the Court of Appeals of the State of New York which dismissed, without opinion, an appeal of the petitioner taken on constitutional grounds from the order of the Appellate Division, First Department, State of New York. Petitioner's earlier appeal to the Appellate Division also affirmed without opinion, the order

of Special Term, Supreme Court, New York County (Chimera, J.), which had earlier dismissed petitioner's civil suit for damages against the respondents on the grounds of *res judicata* and collateral estoppel.

Statement of the Matter Involved

The question presented by this appeal is: Can a civil suit for damages be dismissed on the grounds of *res judicata* and collateral estoppel, contrary to an established precedent, case book and textbook law and without a hearing on the merits of the controversy at any point up to the final appeal affirming that dismissal, without denying the party non-suited his right to due process of law and to equal protection of the laws under the 5th and 14th Amendments?

The facts behind the petitioner's application herein, upon which he claims the right of petition to this Court, are set forth in the Statement of Facts paragraph of this petition.

The bare facts upon which the petitioner applies on constitutional grounds, for a writ of certiorari are the following: Special Term of Supreme Court of New York State issued an Order which was appealed to the Appellate Division, First Department, and which dismissed plaintiff's action against the respondents for $12,000.00 damages for trespass, invasion of privacy and deliberate breach of the lease between the parties. Said Order was issued arbitrarily in spite of the fact that:

(a) there was no legal or equitable bar to petitioner's action;

(b) petitioner claimed fraud on the part of the respondents, which always requires a reopening of the case to judicial review of the facts, *de novo,* under New York State law.

(c) there was never a trial on the merits of the entire controversy between the parties;

(d) the Appellate Division affirmed said dismissal, without opinion, despite the fact that petitioner pointed out in his Brief that the earlier proceedings between the parties, wherein the respondents sued petitioner in Municipal Court of New York City, resulted in a sham order entered after a sham proceeding and an invalid judgment entered when the procedural statute (*5119 CPLR*) which prohibited it from being entered, was ignored. More importantly, the said Appellate Court refused to review the facts *de novo*, as is their function, whenever a claim of fraud is raised on behalf of an appellant. This refusal was demonstrated by the fact that said Appellate Division affirmed, without opinion, and without reopening the matter to judicial inquiry either by the lower court or in their own capacity as a court of appellate review.

(e) the facts were undisputed in the record and clearly showed that there was no jurisdiction on the sham summary proceeding commenced by respondents against the petiitoner in Municipal Court, New York City, and there was no valid judgment entered in a subsequent Municipal Court action for accrued rent because it was entered when the procedural statute (*5119 CPLR*) prohibited it from being entered. Further, it was entered without notice. Despite that state of facts, the lower courts found that the order entered in the sham proceeding and the invalid judgment in the prior action brought by the respondents were a bar to plaintiff's action in Supreme Court, New York, requiring its dismissal for *res judicata* and collateral estoppel.

(f) An appeal taken from the dismissal and that affirmance by the Appellate Division to the Court of Appeals, which is the highest court in the State of New York, was likewise dismissed on motion of the respondents,

(aa) when that Court affirmed, without opinion, and without a hearing on the merits of the controversy between the parties and without a hearing of the appeal on the merits of the question that there was a denial of due process;

(bb) when that Court affirmed the arbitrary action of the lower courts in dismissing the complaint, despite the precedents cited in the lower Appellate Court, despite the case book and textbook law which were to the contrary on the question of *res judicata* and collateral estoppel, likewise cited to the lower Appellate Court and, finally, despite the fact that the entire controversy between the parties had never once been heard on the merits.

2. All of the foregoing actions by Special Term and inaction by the Appellate Courts of the State of New York constitute such a departure from established substantive law and practice in New York State as to constitute a denial to the plaintiff of due process of law and of equal protection of the laws. The paragraph herein entitled "Jurisdiction" cites cases relied on by the petitioner for raising this question within the purview of the jurisdictional requirements of this Court.

3. That the Appellate Division, First Department, in affirming the said Order of Special Term, despite the urging of the petitioner in his Brief of the leading authorities on New York State law to the contrary and of the Civil Practice Rules and Laws to the contrary*** thus sanctioned an arbitrary dismissal of petitioner's suit for civil

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*** *Rasch on Landlord and Tenant* (1950 Edition, Sec. 1209; Section 1211 at *page* 965).

Warrin v. *Haverty*, 149 App. Div. 564, 133 N.Y.S. 959 (App. Div., First Department, 1912).

Application of Wythe, 150 Misc. 405, 268 N.Y.S. 229.

Section 5519 *CPLR*.

Restatement of Torts.

damages. *Further, it sanctioned a capricious departure from established procedure and substantive law as it is practiced in New York State,* and thus it denied petitioner his right to due process and to equal protection of the law under the New York State and United States Constitutions. (5th and 14th Amendments.)

4. That the said action of the Court of Appeals of New York in dismissing petitioner's appeal taken of right on the said constitutional grounds of the denial to him of due process and equal protection of the laws when made on respondents' motion, without opinion, and without a hearing on the merits of petitioner's case on appeal, likewise denied petitioner due process of law and denied him a valuable property rights, i.e., his cause of action against the respondents.

5. Petitioner intends to present at the time of argument of the Petition, if it be granted, further background relating to the claim made in both lower Appellate Courts in the State of New York that a governmental agency and the respondents were directly involved in the controversy between the parties and that agency must bear some responsibility for the litigation that followed and the subsequent denial to the petitioner of his rights to a hearing on the merits of the entire controversy, which has yet to take place, will be explained.

The Facts

Appellant leased a suite of offices from the respondents in March 1962 for a term of three years, cancellable on notice at the end of a year and a half (p. 59)*. The appellant entered possession in March 1962 after executing a standard Real Estate Board lease with respondent (59).

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* References are to pages of record on appeal, filed herein.

Appellant found that the noise and the lack of services of that building known as the Fisk Building on West 57th Street in New York City made it impossible for him to do his work and to practice law there (p. 56, par. 8th).

Appellant suffered continual noise from the next office, the origin of which he now believes were Treasury agents intent upon upsetting appellant and making it impossible for him to work. This condition was at that time of unknown origin to appellant being caused by persons then unknown to him but he later decided that this deliberate "roust" was part of a campaign, deliberately planned and executed by Treasury agents in order to upset appellant and cause him emotional upset.

This fact and the fact that the Landlord permitted slovenly conditions in the corridors of the building and little or no cleaning service in the public toilets and office leased from respondents and the lack of adequate elevator service decided appellant in May 1962 to move from said office premises so leased from respondents on the legal grounds of constructive eviction (pp. 55-57).

Appellant notified Landlord and moved on June 7, 1962, taking all of his furniture and books and removing his telephones. He had been in possession a little more than three months in all. He paid the June rent, and moved his practice to his home then located at 1199 Park Avenue in New York City (52, 61, 62, 65). Then he soon found, the same condition existed—viz., noise, unremitting and constant from the upstairs apartment. But, the persons involved being then unknown to plaintiff, he put it down to coincidence. Soon conditions there became likewise intolerable and appellant soon found himself embroiled in litigation with the Landlord of his apartment building. That case is now pending in this Court. Docket 795, October 1964 Term, Petition For Writ of Certiorari.

But, returning to the instant case. After removing from possession of said office in June 1962, appellant tried to sub-

let the office by advertising it for rent in the New York Times (66). Evidently no one wanted it. The building was run down and poorly serviced, so that it became impossible for appellant to sub-let the office (55-56).

Appellant's motive was to avoid litigation if possible even though he felt he had a good defense to any action on the lease because of the constructive eviction that had forced his removal (52). Therefore, he invited respondents to negotiate a settlement (52).

Nevertheless, respondents' attorney began a summary proceeding in August, 1962, ostensibly to recover possession of premises that had already been surrendered to them in June 1962. Appellant wrote to said attorney for Landlord, one Neuwirth, and asked him to negotiate a settlement. He also informed Neuwirth that the summary proceeding was superfluous since appellant no longer had possession at the time Landlord commenced the proceeding (52).

Landlord's attorney ignored appellant's letter and proceeded to enter a final order, without notice to appellant and without negotiating a settlement (48).

Appellant now contends, and did contend before the Courts of New York State, that that summary proceeding and the final order entered therein were sham and had no legal effect on subsequent proceedings between the parties. Appellant so urged the Lower Court (65), but Special Term (New York Supreme Court), disagreed and entered an order dismissing the appellant's complaint in an action brought in Supreme Court to recover damages for the constructive eviction and for incidental equitable relief. It was that order that was appealed from to the Appellate Division, First Department, of New York State (6-8).

Subsequent to the entry of the so-called final order in the sham summary proceeding in August 1962, the Landlord's attorney attempted to enter judgment thereon, but as a tacit admission that it was sham; take the fact that no such

judgment was entered and Landlord's attorney Neuwirth then called appellant and invited negotiation.

Not wishing to prolong the situation, appellant agreed and met with Landlord's attorney Neuwirth. Negotiations fell through when (66-67) appellant subsequently learned that Landlord full-well knew of the noise and embarrassment caused appellant by the actions of the Treasury people engaged in the over-zealous and illegal activity of "rousting" the prospective subject of a tax investigation. Under these circumstances, appellant felt if anyone had to bear the loss, it should be the Landlord and not the appellant who was thus constructively evicted with Landlord's consent (63).

Subsequently, in view of the lack of candor on the part of Landlord and its attorney Neuwirth, appellant decided to resist any action brought to recover the accrued rent following his removal from the premises. There was also another factor; viz., that the damages following from the move forced on appellant were beginning to mount (63). The forced move and after only three months of tenancy had a very bad effect on appellant's practice, resulting in a loss of some $12,000 in all over a period of two years following his forced removal. This was reflected in loss of earnings alone over that period of time.

Thereafter, Landlord began a proceeding in Municipal Court of New York City wherein they attempted to recover the accrued rent. Appellant asked an old colleague and school mate, also an attorney, one Ralph Verni, to enter a general denial and a counterclaim for damages then accrued (25-27, 34). Verni had his office in Baldwin, New York, some thirty miles from New York City. Verni and appellant conferred and it was decided to defend against the action on the grounds of constructive eviction and the damages flowing therefrom (34). It was also decided as an incidental item to add a claim for conversion, which was for some books belonging to a former tenant, of said office. The latter was a client of appel-

lant's and, the books later turned up in the latter's home in Briarcliff, New York. This item had nothing to do with the matter in controversy between the parties and was subsequently dropped from the action commenced in Supreme Court by the appellant (53-58).

Thereafter, in December 1963, after appellant had again been forced to move from 1199 Park Avenue, his home, because of the continued illegal tactics of the Treasury people in annoying appellant by constant harassment, and noise from the upstairs apartment, illegal entry of his apartment and illegal searches and seizures of his records, appellant found himself unpacking in his new apartment when Landlord's attorney Neuwirth, took a default after inquest on the action for accrued rent in Civil Court, *the first time the case was on the Calendar.* This happened December 4, 1963. Appellant called Verni, his then attorney but the latter was not available. Appellant had received no notice whatsoever of the trial or of the entry of judgment. Nor had his then attorney, Verni (34). Appellant then promptly proceeded to obtain an order to show cause on December 5, 1963 to reopen the default, explaining that his attorney was out of New York City, and he himself had been otherwise occupied and neither he nor his attorney had been notified, by Landlord's counsel, before the inquest was taken as is usual in cases between attorneys as a matter of professional courtesy (34).

Subsequently, the motion to reopen the default in Civil Court (formerly Municipal Court) being denied for the alleged reason that there was no affidavit of merit in the motions papers (although there clearly was (34)) (36), appellant went up to the Appellate Term to get a reversal. This was denied, without opinion and without a decision on the merits, as a matter of discretion by Appellate Term. (See Order of J. Hofstadter, Cappozolli & Hecht) (39-40). The earlier motion to reopen the default in Civil Court had likewise been denied not on the merits, but without prejudice and in the exercise of discretion (36).

Following that sequence of events, appellant commenced the instant action in Supreme Court against Landlord, the respondents herein, in March 1964 (53-58). Landlord's new attorneys, Wein, Lane & Klein, appearing herein, promptly moved to dismiss. That motion was granted in Special Term by J. Chimera and the order entered thereon on June 1, 1964 (73-74).

The grounds seemed to be *res judicata* and collateral estoppel. Appellant by this time had suffered a very serious loss of income resulting from the moves compelled from respondent's building where he had his office and from 1199 Park Avenue his apartment where he had attempted to practice law while searching for a new office. Therefore, he decided to pursue the actions for relief previously mentioned for Civil Damages, including the instant action. At the present writing, an application for a temporary restraining order against the Treasury people is likewise contemplated, but must await corroborative evidence.

Before the matter of jurisdiction is gone into at length, we feel it necessary to explain why under New York State Law, the courts in this case acted arbitrarily in holding that petitioner's action was barred by *res judicata.* The next portion is taken almost *verbatim,* from the petitioner's brief filed with the Appellate Division, First Department of New York State.

Questions Presented on This Appeal*

1. Can a summary proceeding be commenced after tenant has removed from possession of the demised premises? No.

2. Is such a proceeding sham? Yes.

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* This section and the section that follows is taken verbatim from petitioner's brief filed with the App. Div., 1st Dept. (pp. 11-21) on the appeal taken from Special Term's (S. Ct. N. Y.) dismissal of his complaint.

3. Can a final order issued in such sham proceeding be *res judicata* on subsequent proceedings between the Parties? No.

4. Can a "judgment" entered in an action for accrued rent upon unwitting default of former tenant, be deemed *res judicata* and collateral estoppel against the latter when the order denying reopening of the said default had been timely appealed and said appeal had been perfected and was still pending when the alleged "judgment" was entered by the former Landlord? No.

5. Can the *fraud* of Landlord in procuring and consenting to the constructive eviction of tenant in such a case of default be deemed beyond attack of an independent action by tenant? No.

6. Can the deliberate wrongdoing of Landlord in procuring and consenting to a constructive eviction of a tenant be attacked collaterally following an unwitting default in a prior action for accrued rent? Yes.

ARGUMENT FOR APPELLANT

POINT I

There was no *res judicata* the summary proceeding was a sham.

a) The final order in the prior summary proceeding between the parties, was unnecessary and ineffective. In the statement of facts above appellant explained how he moved from the demised office premises in June 1962 *before* Landlord commenced a sham proceeding to recover possession in August 1962. In such cases it is well settled that tenant being out of possession, no summary proceeding can be instituted. This is because the Landlord-tenant relationship no longer exists.

See *Rasch*—Landlord and Tenant (1950 Ed.) Section 1209 which states:

"It is an essential jurisdictional fact in order to maintain summary proceedings, that the party sought to be removed either is in actual, or constructive possession, or at least claims the right to possession, at the time of the commencement of the proceeding."

Citing:

Warrin v. *Haverty*, 149 A. D. 564, 133, N.Y.S. 959 (App. Div. 1st Div. 1912).

As Judge Laughlin said in said case, *supra*,

"We are of the opinion that the Court was without jurisdiction to make the order for the uncontroverted evidence shows that the tenant was not in possession at the time the proceeding was instituted and was not holding over or claiming any rights as a tenant of the premises. It is essential to the jurisdiction of the Court to entertain a summary proceeding and to make a final order therein, that the tenant should be in possession."

"It is not necessary to decide whether the tenant was justified in removing from the premises on the theory that there was a constructive eviction, or whether the Landlord accepted the surrender, for, since it clearly appears that the tenant was not in possession, the summary proceeding cannot be sustained."

Warrin v. *Haverty* (*supra*).

See also Section *1211* Rasch—Landlord—Tenant at page 965 where it is stated:

"The removal of the tenant prior to the commencement of the proceedings will deprive the Court of jurisdiction to entertain them."

Citing:

Application of Wythe, 150 Misc. 405, 268 N.Y.S. 229.

This point was urged before Special Term both in the affidavit in opposition to the motion to dismiss the complaint and in the appellant's application for reargument (See pp. 67-68 and p. 61 of Papers on Appeal). Nevertheless, the lower court found the final order entered in the summary proceeding commenced *after* appellant had moved from the demised premises was a bar to the action commenced in Supreme Court (p. 74).

Since as we have seen in the light of authorities cited above the Civil Court had no jurisdiction over the parties in that earlier summary proceeding, because of a lack of landlord-tenant relationship (due to tenant's removal from the demised premises) the final order certainly had no effect on the rights of the former tenant and could not be pleaded in bar to his subsequent action for damages, as *res judicata*.

See:

Rasch—Landlord and Tenant, supra;
Warrin v. *Haverty, supra;*
Application of Wythe, supra.

Special Term was therefore, clearly in error, we submit, in its order of June 1, 1964, in holding the final order entered in the prior summary proceeding between the parties was a bar to the instant action.

POINT II

There was no collateral estoppel the action in Civil Court resulted in a void judgment.

The order appealed from seems to base its dismissal of the complaint not only on the ground of *res judicata*, but also collateral estoppel, meaning the matter in dis-

pute had once before been litigated between the same parties. But was that the case? We submit, there was not only no *res judicata* but also no collateral estoppel. Not only was there a default but there was no valid judgment entered on it.*

a) The "judgment" entered after default in the Civil Court action for accrued rent was defective. It is well settled we submit, that once an appeal has been taken in an action in Civil Court and the appeal perfected, the respondent is stayed from further proceedings on the default until the appeal is finally determined.

See Section *5519 CPLR:*

> "(a) Stay without court order—Service of a notice of appeal upon the adverse party—stays all proceedings to enforce the judgment—where:
>
> 2. The judgment or order directs the payment of a sum of money and an undertaking in the sum is given that if the judgment or order appealed from—is affirmed, or the appeal is dismissed, the appellant shall pay the amount directed to be paid."

This point too was urged before Special Term in appellant's application for reargument (pp. 68, 70, 71).

The rationale is quite simple. Both the Civil Practice Law and Rules and the Civil Court Rules where the action for accrued rent was pending, provide that upon the filing of a notice of appeal with proper affidavit of service and a bond for the costs to secure the appeal by a satisfactory surety or bonding company (which was the case here), all further proceedings between the parties are stayed automatically until the appeal is finally determined.

See Section *5519 CPLR.*
But what did respondents do here?
Their greed proved their undoing.

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* Further there was no notice of entry of judgment.

They entered an unwitting default against appellant the first time the action for accrued rent was on the Calendar in Civil Court—without notifying either appellant or his then counsel, Verni as professional courtesy usually requires (33-35). This was on December 4, 1963 (p. 30).

But the said order entering the default contained a ten day stay (30). That meant appellant had until December 14, 1963 to perfect an appeal to the Appellate Term. He then did as required by the Rules, by filing and serving his Notice of Appeal and a bond from the USF & G in the sum of $1,000 on December 13, 1964. That automatically stayed further proceedings by respondents on the default taken by inquest. (See Section 5519 CPLR, cited, *supra*), until the appeal was determined in March 1964.

But it didn't stay respondents or their then attorney Neuwirth. He actually tried to enter judgment on December 31, 1963 while the appeal was still pending (43).

Since the alleged "judgment" was in fact defective for the reason that it had been prematurely "entered" when it was stayed by the perfected appeal, it could not be collected. The bonding company, USF & G so informed respondents attorney Neuwirth when he called to demand collection of same even after the appeal had been dismissed by the Appellate Term on March 5, 1964 (39-40).

It was this same "judgment" of December 31, 1964 which respondents new attorneys, Wein, Lane & Klein, now seek to set up here as they did in Special Term as a bar to appellant's Supreme Court action commenced against respondents in March 1964. It was this same "judgment" which the bonding company refused to pay and which we submit, is not a valid judgment at all.

For the reason that it was defective and invalid quite simply, it could not, we submit, be a bar to appellant's action in Supreme Court and certainly no basis for dismissal of his complaint by Special Term below, from which we have appealed herein (see Section 5519 CPLR)

Therefore, again we respectfully submit the Lower Court was clearly in error. The so-called "judgment" of December 31, 1963 was no judgment in fact. It was a nullity and no bar to appellant's action in Supreme Court. Special Term was in error in holding otherwise, we submit (73, 74). It was "entered" at a time when the law forbade its being entered and was therefore a nullity.

b) We also submit that the Appellate Division has it in its power further, in its plenary review of this record of the prior proceedings and in the absence of a valid judgment (in the action for accrued rent in Civil Court) and in the absence of a valid final order (in the earlier summary proceeding between the parties) to go over the entire record and reopen the controversy allegedly closed by Appellate Term's order of March 5, last.

c) Finally because of *fraud* on the part of the Landlord, we contend that respondents as Landlord did deliberately consent to and procure the constructive eviction of former tenant, appellant herein, and we intend to so prove when appellant's main action in Supreme Court is tried finally. Said fraud, we submit, must vitiate any bar to the instant action, regardless of any other consideration explained herein.

d) The Landlord being guilty of wrong doing we submit, it is well settled they cannot profit by their own wrongful act.

Restatement of Torts

e) Further, in equity, fraud vitiates everything.

f) Finally, if further reason be needed, appellant in his Supreme Court action had need for equitable relief (Recission, etc.), which was not readily available in the Civil Court action in which respondents entered the unwitting default for accrued rent.

As triers of the facts *de novo* and in the lack of legal or equitable bar to same, we submit this Court can now

in the exercise of its plenary powers of review, finally open up the whole controversy on the merits to the Supreme Court action between the parties, which will finally determine the rights of the parties.

POINT III

Authorities cited by landlord in Appellate Term and on motion to dismiss in Special Term are not in point.

Landlord's counsel have cited a plethora of cases concerned with the finality of and the binding effect of final orders and judgments entered on default, in prior proceedings between the parties. However, the fact is that neither the final order in the sham summary proceeding of August, 1962 and the so-called "judgment" entered on December 18, 1963, while the appeal to Appellate Term was still pending are any bar to appellant's instant action in Supreme Court. Therefore, these cases are not in point.

Further, the need for equitable relief of appellant which was not available in earlier Civil Court proceedings (summary proceeding and for accrued rent) and landlord's fraud in procuring appellant's constructive eviction are added reasons, if any be needed, for reversal of the Order of Special Term dismissing the appellant's complaint, which was clearly in error.

Thus concludes, petitioner's brief before the Appellate Division of N. Y. State.

Thus ample authority was cited, we submit, to that Court requiring it to reverse Special Term's dismissal of the complaint. It's arbitrary dismissal of the appeal however without opinion and contrary to the facts and law cited to it as well as the lack of hearing and lack of notice on the entry of a default "judgment" form the

basis of this petition for writ of certiorari, on the ground of denial of due process, as petitioner claimed when he appealed to the highest Court of N. Y. State, the Court of Appeals. That Court's refusal to entertain the appeal on constitutional grounds is the specific reason for this further appeal.

Jurisdiction

1. Jurisdiction of this Court is involved under Title 28, U. S. Code, 1257, which provides in part:

> "Final judgment or decrees rendered by the highest court of a state, on which a decision could be had, may be reviewed by the Supreme Court as follows:
> ". . . By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution. . . ."

2. Rules of the Supreme Court of the United States:

Rule 19. Jurisdiction on Writ of Certiorari. Paragraph 1 (b)—

> "Where a Court of Appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

3. The following cases are believed to sustain the jurisdiction of this Court:

Windsor v. *McVeigh*, 93 U. S. 274 (notice and hearing necessary to entry of judgment);
American Surety Company v. *Baldwin*, 287 U. S. 156 (entry of judgment without notice may be denial of due process even where there is jurisdiction over the person and subject matter);
Postal Telegraph Cable Company v. *Newport*, 247 U. S. 464, 38 Supreme Court 566, 62 L. Ed. 1215

(judgment of *res judicata* reversed because of patent error by State Court);

Rooker v. *Fidelity Trust Company*, 263 U. S. 413 (S. Ct. may review validity of State Ct. judgment on const'al grounds), 44 Supreme Court 149, 68 L. Ed. 362;

Fidelity Nat. Bank & Trust Co. v. *Swope*, 274 U. S. 123 (adequacy of notice before judgment);

Louisville & N. R. Co. v. *Schmidt*, 177 U. S. 230 (opportunity to be heard essential requirement of due process).

See also: 13 A.L.R. 2d 477. At page 477, of 13 A.L.R. 2d, the general theme of these cases is summarized.

> "It is possible to allege a substantial Federal question under the due process of law requirement of the Federal Constitution on the ground that a State (Court) violated the guarantee . . ."

To do so, one must show substantial deprivation of due process in the procedural sense by denying notice and hearing, et cetera, or, if possible, in some substantive sense by arbitrary state (Court) action. The petitioner claims that at no time in the entire history of his litigation with respondents has he been given a hearing on the merits of his case, despite the fact that the order and "judgment" set up in bar to his civil action were clearly sham and invalid.* And, further, petitioner claims that the sanction of Special Term's dismissal of his action by the Appellate Courts, without opinion, and despite undisputed facts, law and authority to the contrary, constituted arbitrary inaction by said Appellate Courts of the State of New York.

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* The order was invalid because of lack of jurisdiction by the Court issuing it. The judgment was invalid because it was entered when N. Y. procedure dictated it couldn't be entered and because it was entered without notice and without a hearing to petitioner.

4. The Court of Appeals of the State of New York is the highest Court of the State.

5. The Order of which review is sought is a final order of the Court of Appeals of the State of New York in that it dismissed petitioner's appeal from the lower court's dismissal of his civil suit, thereby depriving him of his action for damages without due process of law.

6. The order herein sought to be reviewed was filed on November 19, 1964.

7. The Federal questions of substance which have been decided by the State Court are:

(1.) Can a cause of action for civil damages be dismissed by deliberate and arbitrary refusal of an Appellate State Court to review such dismissal in the face of undisputed facts, case book and precedent law to the contrary?

(2.) Can a State Appellate Court sanction such a departure from established substantive law and practice as to deny the plaintiff his right to a hearing on the merits of his case at any point in the judicial history of the controversy between the parties?

(3.) Can State Appellate Courts sanction such a departure and dismissal of a cause of action without opinion, and without a hearing, on the merits and to do all of this despite plaintiff's clear right under existing State Law and under the Federal and State Constitutions, to due process of law and a fair hearing?

8. The Federal question was timely raised and considered. It was raised on petitioner's appeal filed with the Court of Appeals. (See pp. 3 to 4 of petitioner's affidavit in opposition to defendants' motion to dismiss filed with the Court of Appeals.)

Reasons Relied Upon for Allowance of the Writ

1. An important question of law has been presented by this petition.

Can a lawsuit be arbitrarily dismissed contrary to undisputed facts, case book and textbook law and established precedent, and without a hearing, on the merits at any point up to final dismissal without denying the litigant due process of law and equal protection of the laws under the 5th and 14th Amendments of the United States Constitution? We think not.

2. Can a judgment be entered without notice and without a hearing to the party against whom it is entered and pleaded in bar as res judicata to an independent action, resulting in the dismissal of the latter, without denying the party aggrieved thereby his right to due process under the 5th & 14th Amendments? We think not.

3. Regardless of jurisdiction, may a judgment be entered without notice and without a hearing to the party aggrieved without violating due process requirements of the 5th, 14th Amendments? We think not.

(a) Where a judgment is entered despite a state procedural statute prohibiting same at the time it was entered, can it be raised in bar as res judicata to an independent action between the same parties without violating due process, if sustained as a bar to that action? We think not.

(b) Can a judgment entered on default without notice and without a hearing on the merits of the controversy between the parties in one action, be attacked collaterally in another action between the same parties over the same controversy, especially when a fraud subsequently discovered after the commencement of the second action is advanced as a reason for such attack by the aggrieved party?

And can a refusal to permit such attack by a State Court be deemed a denial of due process in light of the lack of a hearing or of notice when the original judgment was entered? We think not.

(d) Can a refusal to review a dismissal of a cause of action by a State Appellate Court where a claim is made of a denial of due process, be deemed in itself, a denial of due process? We think so.

Lucian J. Rossi
Petitioner in Personam
375 Park Avenue
New York 22, N. Y.

APPENDIX

Order of Affirmance of Appellate Division, First Department.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 20th day of October, 1964.

Present—Hon. Charles D. Breitel, Justice Presiding.
" Francis L. Valente,
" James B. M. McNally,
" Harold A. Stevens,
" Earle C. Bastow,

Justices.

7939

Affirmance of Order

Lucian J. Rossi,

Plaintiff-Appellant,

v.

Peter L. Malkin, Harry B. Helmsley, Irving Schneider, J. Herbert Leder, Seymour A. Smith, Frank Robinson, Alvin S. Lane, Henry W. Klein, Alvin Silverman, Leo Weinstein, William F. Purcell, Bernard T. Hein, co-partners, doing business as Fisk Building Associates,

Defendants-Respondents.

An appeal having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County, entered on the 1st day of June, 1964, grant-

ing defendants' motion to dismiss the complaint, and said appeal having been argued by Mr. Lucian J. Rossi, of counsel for the appellant, and by Mr. Ralph W. Felsten, of counsel for the respondents; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $30 costs and disbursements to the respondents.

Enter:

VINCENT A. MASSI,
Clerk.

Order of Court of Appeals, November 19, 1965.

STATE OF NEW YORK

At a Court of Appeals for the State of New York, held at the Court of Appeals Hall in the City of Albany, on the nineteenth day of November A. D. 1964.

Present: Hon. Charles S. Desmond,
Chief Justice Presiding.

No. 907

Lucian J. Rossi,
Claimant-Petitioner,

against

Peter L. Malkin, Harry B. Helmsley, Irving Schneider, J. Herbert Leder, Seymour A. Smith, Frank Robinson, Alvin S. Lane, Henry W. Klein, Alvin Silverman, Leo Weinstein, William F. Purcell, Bernard T. Hein, co-partners, doing business as Fisk Building Associates,

Defendants-Respondents.

A motion having theretofore been made upon the part of the respondents to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and the appeal dismissed upon the ground that there is no substantial constitutional question directly involved.

A copy,

(s) Gearon Kimball,
Deputy Clerk.

Seal

Notice of Appeal to the Court of Appeals.

SUPREME COURT OF THE STATE OF NEW YORK.

NEW YORK COUNTY.

Index No. 06692—1964

LUCIAN J. ROSSI,

Plaintiff-Appellant,

v.

PETER L. MALKIN, HARRY B. HELMSLEY, IRVING SCHNEIDER, J. HERBERT LEDER, SEYMOUR A. SMITH, FRANK ROBINSON, ALVIN S. LANE, HENRY W. KLEIN, ALVIN SILVERMAN, LEO WEINSTEIN, WILLIAM F. PURCELL, BERNARD T. HEIN, co-partners, doing business as FISK BUILDING ASSOCIATES,

Defendants-Respondents.

SIRS:

PLEASE TAKE NOTICE, that the above named plaintiff hereby appeals to the Court of Appeals from the Order of the Appellate Division, First Department, entered in the office of the Clerk of the County of New York, on or about the 21st of October, 1964, unanimously affirming the Order of Special Term of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on June 1, 1964 (by Mr. Justice Chimera), and the plaintiff appeals from each and every part of the said order, affirming the dismissal of plaintiff's complaint, and from the whole thereof:

And Please Take Further Notice that this appeal is taken as of right on the grounds that constitutional rights were denied plaintiff and that substantial constitutional

issues under the Federal and New York State Constitutions, are involved in this appeal.

Dated: New York, N. Y., October 31, 1964.

Yours, etc.,

LUCIAN J. ROSSI,
Attorney for Plaintiff-Appellant,
Appearing in Personam,
Office & P. O. Address,
375 Park Avenue,
New York, N. Y. 22.

To:

WEIN, LANE & KLEIN,
Attorneys for Respondents,
Office & P. O. Address,
60 East 42nd Street,
New York, N. Y. 17.